IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Arb. Case No. 18 of 2003.

Judgement reserved on: 9.5.2007.

Date of decision: 14.5.2007.

M/s Himachal Construction Company .....Claimant/objector.

Vs.

The Union of India .... Respondent.

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The Hon'ble Mr. Justice Kuldip Singh, Judge.

Whether approved for reporting?[1]

For the claimant-objector : Mr. Suneet Goel, Advocate.

For the Respondent : Mr. Sandeep Sharma, Assistant Solicitor General of India.

Kuldip Singh, Judge.

The claimant-contractor has filed objections, under Section 34 of the Arbitration and Conciliation Act, 1996 (for short, Act), against the award, dated 30.12.2002, as corrected by supplementary award, dated 5.12.2002.

2. The facts are that parties entered into an agreement for construction of TE Building at Rewalsar HP and a formal contract agreement No. 35/EE/TCD/SML/93-94 was executed between the claimant and the respondent. A dispute arose between the parties relating to various amounts. The claimant claimed Rs. 11,70,000/- with interest and respondent claimed Rs. 3,73,404/- The dispute was referred to sole arbitrator Sh. A.K.Nagar, Director (BW), vide letter

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Whether the reporters of the local papers may be allowed to see the Judgment?

dated 9.11.1999. The arbitrator entered into the reference on 17.11.1999. He ultimately made and published the award on 30.10.2002.

3. It has been alleged by the claimant- objector that after the receipt of the award, respondent made a representation dated 28.11.2002 to the Arbitrator without endorsing any copy of the same to the claimant- objector and acting on such representation of the respondent, the Arbitrator made a fresh award in respect of claim No.1 preferred by claimant-objector and thereby reduced the amount awarded in favour of the claimant-objector from Rs. 1,39,170.46 to Rs. 46,106/-, vide supplementary award, dated 5.12.2002.

4. The supplementary award has been assailed on the ground that the Arbitrator has not afforded to the claimant-objector any opportunity to plead his case and merely on the asking of the respondent, made the supplementary award dated 5.12.2002.

5. The Arbitrator while making the award against claim No.1 and awarding a sum of Rs. 1,71,357/- in favour of the claimant in respect of security deposit, has failed to note the admitted position between the parties that out of the said sum, an amount of Rs. 36,228/- was lying in the shape of Fixed Deposit and that in addition to the amount of security the claimant is entitled to the amount of interest which had accrued on the Fixed Deposit Receipt. The award of the learned Arbitrator is against the public policy of India.

6. It has also been alleged that while making the award against claim No. 1, the Arbitrator has failed to make the award in respect of the admitted amount of Rs. 90,726/-, which have been

withheld by respondent for final settlement of account. The award of the Arbitrator against claim No. 2, is also against the law of the land.

7. The Arbitrator, while making the award against counter claims, preferred by the respondent, has failed to take note of the defence raised by the claimant and, therefore, it is not a reasoned award. On these grounds, the claimant-objector assailed the supplementary award, dated 5.12.2002.

8. The respondent has filed the reply and has taken preliminary objections that the objections are not covered by Section 34 of the Act. The Arbitrator has given the supplementary award, under Section 33 of the Act, after following principle of natural justice. It has been alleged that the claimant was given notice by the respondent for correction, vide letter dated 28.11.2002, Annexure-II, which was received by the claimant-objector, vide receipt Annexure-I. The respondent has supported the supplementary award. It has been pleaded that award, dated 30.10.2002, has become final and objections against that award have become time barred.

9. I have heard the learned counsel for the parties and have also gone through the record.

10. The respondent submitted an application, dated 28.11.2002, Annexure-II for rectification of the award dated 30.10.2002 to the Arbitrator. In the application, it has been submitted that an amount of Rs. 1,39,170/- has been awarded to the claimant on account of escalations, as per clause 10(CC) of the agreement. The amount under clause 10(CC) payable during this period works out to be Rs. 34533/-. Since no calculation is available in the award

dated 30.10.2002 for arriving at the escalation payable to the tune of Rs. 1,39,170, there seems to be an arithmetical calculation error. In these circumstances, respondent filed an application for rectification of award dated 30.10.2002. The learned counsel for the claimant has confined his submissions to supplementary award, dated 5.12.2002 only and has submitted that no notice of the application, under Section 33 of the Act was given by the respondent to the claimant, but even if it is assumed that such a notice was given in that case also, it was the duty of the Arbitrator to issue notice to the claimant, under Section 24 of the Act and also on the basis of principle of natural justice before considering the application, under Section 33 and more particularly when Arbitrator wanted to rectify the award, dated 30.12.2002. The Arbitrator without giving notice to the claimant, made the supplementary award dated 5.12.2002 and reduced the award amount against claim No.1 from Rs. 1,39,170 to Rs. 46,106/-.

11. The learned Assistant Solicitor General of India has failed to show from the record that the Arbitrator had issued notice to the claimant on the application, under Section 33 of the Act of the respondent before making supplementary award, dated 5.12.2002. The contention of the learned Assistant Solicitor General of India that notice of the application, vide Annexure R-I, was given by the respondent to the claimant is sufficient notice and Arbitrator has committed no error in making the supplementary award. The objections filed by claimant against supplementary award are not covered by Section 34 of the Act. In my opinion, the notice given by

the respondent to the claimant, vide Annexure R-I, is not sufficient. It was the duty of the Arbitrator to give notice of the application, under Section 33 of the Act to the claimant by fixing a date so that the claimant could present his case. The claimant could very well ignore the notice of the respondent under the bonafide belief that Arbitrator might not entertain the application and dismiss it without calling the claimant.

12. The net result of the above discussion is that the Arbitrator has made the supplementary award, dated 5.12.2002, without notice to the claimant and hence the supplementary award is against the principle of natural justice and in violation of Section 34(2)(a)(iii) of the Act, the objections filed by the claimant-objector against the supplementary award are covered by Section 34 of the Act. The supplementary award, dated 5.12.2002, passed by the Arbitrator, is set-aside, with no orders as to costs.

May 14, 2007. **(Kuldip Singh)**
(*Hem*) **Judge.**